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In The

Supreme Court of the United States

October Term, 1984

ARNOLD BAUMANN,

Petitioner,

vs.

TYPOGRAPHIC INNOVATIONS, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DAVID S. FRIEDBERG
Attorney for Petitioner
350 Fifth Avenue
New York, New York 10118
(212) 947-7291

0212
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QUESTION PRESENTED FOR REVIEW

Does petitioner Arnold Baumann, a former employee of respondent Typographic Innovations, Inc., and a former member of defendant New York Typographical Union No. 6, have a separate and independent contract claim to which may be applied a statute of limitations other than that held applicable in *Del Costello v. International Brotherhood of Teamsters*?

PARTIES BELOW

The names of the original parties in the court below were Arnold Baumann, Plaintiff-Appellant against Typographic Innovations, Inc., Defendant-Appellee and Bertram A. Powers, as President of New York Typographical Union No. 6, Defendant. The action against the Defendant Powers was discontinued upon consent of all parties as more fully set out in the Statement of Material Facts.

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No.

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TYPOGRAPHIC INNOVATIONS, INC.,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner Arnold Baumann hereby petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Second Circuit which affirmed the judgment of the United States District Court, Southern District of New York, dismissing petitioner's complaint as time barred under the presumed mandate of *Del Costello v. International Brotherhood of Teamsters.*

OPINION BELOW

The District Court rendered a memorandum opinion dated January 11, 1984 upon which a judgment was granted dated January 18, 1984 which dismissed petitioner's complaint. The order of the United States Court of Appeals for the Second Circuit, affirming the judgment below and the memorandum opinion of the District Court and the judgment of the District Court are contained in the appendix to this petition.

JURISDICTION

The order of the United States Court of Appeals for the Second Circuit of which review is sought is dated August 31, 1984. This Court has jurisdiction to review the order by reason of the provisions of 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Amendment V of the United States Constitution provides:

> ". . . nor shall any person . . . be deprived of life, liberty, or property without due process of law . . . ."

STATEMENT OF MATERIAL FACTS

Petitioner was employed by respondent Typographic Innovations, Inc. between October 31, 1977 and January 22, 1981, pursuant to the terms of a collective bargaining agreement. Petitioner seeks unpaid wages totalling $159,144 denied him by his former employer.

Petitioner's employment with respondent was terminated January 22, 1981. He ceased his membership with defendant New York Typographical Union No. 6 in January 1981.

Petitioner commenced this action for unpaid wages in the Supreme Court of the State of New York on October 4, 1983. The complaint alleged additional causes of action against defendant New York Typographical Union No. 6 for its failure to represent petitioner in good faith with respect to his claims against respondent.

The appeal before the United States Court of Appeals for the Second Circuit was limited solely to the District Court's dismissal of petitioner's First Cause of Action against respondent arising from respondent's breach of the terms of its contract to pay petitioner wages in accordance with the contract terms. After perfecting his appeal from the adverse judgment of the District Court, petitioner had stipulated to withdraw his appeal solely as to defendant Bertram A. Powers as President of the New York Typographical Union No. 6.

Petitioner had earlier commenced an action against respondent in the Civil Court of the City of New York, County of New York for sick days and health benefits due him in accordance with the terms of the collective bargaining agreement.

That action had been authorized by a judgment of the Supreme Court of the State of New York, County of New York, dated February 2, 1982 which ordered that arbitration between petitioner and both respondent and defendant be permanently stayed. There has not been a final adjudication of the Civil Court action.

Respondent in the Civil Court action had interposed substantial counterclaims against petitioner arising from petitioner's alleged tortious interference with respondent's business and for his alleged appropriation of respondent's confidential information.

Both the action in the Civil Court of the City of New York, County of New York and that commenced by petitioner in the Supreme Court of the State of New York — which was removed to the United States District Court, Southern District of New York on motion by defendant — arose from the same collective bargaining agreement. Specifically, respondent in both cases considered petitioner's actions as relief sought for traditional breaches of contract. Respondent's answer in this action is in the form of a general denial without any affirmative defenses.

The United States Court of Appeals' determination, that this action is predicated upon an allegation that the defendant union breached its duty of fair representation in pursuing its claim, is a misstatement of the facts. Its determination fundamentally warped the distinction between *Del Costello v. International Brotherhood of Teamsters* and *Auto Workers v. Hoosier Cardinal Corp.* in determining the applicable statute of limitations in the instant case.

REASONS FOR GRANTING THE WRIT

I.

This case provides this Court with an opportunity to further elucidate the continued viability of *Auto Workers v. Hoosier Cardinal Corp.*, there appears to be disagreement within the United States Court of Appeals for the Second Circuit as to the applicable scope of *Del Costello v. International Brotherhood of Teamsters.*

This Court recognizes that in an appropriate case the determination of *Auto Workers v. Hoosier Cardinal Corp.* is still viable in selecting the appropriate statute of limitations where the facts are analogous to an ordinary breach of contract case. In the case of *O'Hare v. General Marine Transport Corporation*, the United States Court of Appeals for the Second Circuit affirmed

the lower court's order that *Del Costello v. International Brotherhood of Teamsters* ". . . appears to turn on the peculiar nature of a 'duty of fair representation' action. . . ." (578 F.S. 72, 73).

The decision affirming the lower court's order, which refused to bar plaintiff's claim under the six month statute of *Del Costello,* specifically held that

> ". . . we agree with the district court that the *Del Costello* holding turns on the particular nature of the duty of fair representation action, and cannot reasonably be expanded to all section 301 claims that involve facts which might also have established an unfair labor practice charge." (Opinion not officially reported, dated July 20, 1984, page 5466).

In this case, both the District Court and the Court of Appeals found that petitioner's cause of action arose solely as a result of the defendant union's breach of its duty of fair representation.

Neither court gave weight to the fact that the petitioner sought in his First Cause of Action relief solely for breach of a contract — a factual setting closely resembling the traditional breach of contract cognizable at common law.

That a union, *Auto Workers v. Hoosier Cardinal Corp.,* was the litigant rather than the individual employee should have no legal consequences in the factual setting of this case. Petitioner's action against his former employer does not derive from the union's denial of his right to fair representation. It is a classic instance of a breach of contract action between the petitioner and his former employer — an action which the Court of Appeals in the case of *O'Hare v. General Marine Transport Corporation* found to resemble the traditional Section 301 breach of contract action.

CONCLUSION

For the reasons above stated, this petition for a writ of certiorari should be granted and upon granting the certiorari the Court should reverse the order of the United States Court of Appeals which affirmed the judgment of the United States District Court dismissing the complaint.

Respectfully submitted,

DAVID S. FRIEDBERG
Attorney for Petitioner

APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED AUGUST 31, 1984

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 31st day of August, One Thousand Nine Hundred and Eighty-four.

PRESENT:

HON. ELLSWORTH A. VAN GRAAFEILAND,
HON. RALPH K. WINTER,
HON. GEORGE C. PRATT,
Circuit Judges

ARNOLD BAUMANN,

Plaintiff-Appellant,

v.

TYPOGRAPHIC INNOVATIONS, INC.,

Defendant-Appellee.

ORDER
84-7148

Arnold Baumann appeals from an order of the United States District Court for the Southern District of New York (Lowe, J.), filed January 18, 1984, dismissing his complaint as time-barred. We affirm.

Opinion

Appellant asks the Court to distinguish his wage claim against a former employer from the "hybrid § 301/fair representation claim[s]" which the Supreme Court, in *Del Costello v. International Brotherhood of Teamsters*, 103 S. Ct. 2281, 2291 (1983), held were governed by a six-month statute of limitations. We can find no relevant distinction. As in *Del Costello*, appellant's wage claim arises under a collective bargaining agreement, the terms of which call for resolution of disputes through grievance procedures. As in *Del Costello*, appellant's action is predicated upon an allegation that the union breached its duty of fair representation in pursuing his claim. Appellant thus has no separate and independent contract claim to which the Court might apply a statute of limitations other than that held applicable in *Del Costello*. *See Assad v. Mount Sinai Hospital*, No. 82-7251, slip op. (2d Cir. Jan. 3, 1984).

Contrary to appellant's theory, this case is not like *International Union, United Auto Workers, AFL-CIO v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966), where the Court applied a state statute of limitations in a union's claim against an employer. Wholly different principles are involved when the plaintiff is a union which is not bound by an agreement to pursue grievance procedures through a third party, and the complaint does not raise issues of fair representation under the National Labor Relations Act.

Because appellant commenced this action more than six months after the alleged cause of action arose, the district court properly dismissed the complaint.

Affirmed.

s/ Ellsworth A. Van Graafeiland
Hon. Ellsworth A. Van Graafeiland

Opinion

s/ Ralph K. Winter
Hon. Ralph K. Winter

s/ George C. Pratt
Hon. George C. Pratt

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

ORDER OF THE UNITED STATES DISTRICT COURT FILED JANUARY 18, 1984

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

CIVIL

JUDGMENT

ARNOLD BAUMANN

Plaintiff

-against-

TYPOGRAPHIC INNOVATIONS, INC., ET ANO

Defendants

Defendant(s) having moved for an order pursuant to Rule 12(b)(6), of the Fed. R. of Civ. P., and the said motion having come before the Honorable Mary Johnson Lowe, United States District Judge, and the Court thereafter on January 17, 1984, having handed down its memorandum endorsement granting the said motion, it is,

ORDERED, ADJUDGED AND DECREED: That the complaint be and it is hereby dismissed as time barred.

DATED: NEW YORK, N.Y.

s/ Raymond F. Burghardt

MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FILED JANUARY 17, 1984

Arnold Baumann v. Typographic Innovations, Inc., et al, 83 C. 7570

This action was commenced on October 4, 1983, in the Supreme Court of the State of New York, County of New York, by the service of a Summons and Verified Complaint upon New York Typographical Union No. 6 (defendant Union). Plaintiff alleges that Typographic Innovations, Inc. (defendant company) breached its obligations under the collective bargaining agreement between it and defendant Union and that defendant Union failed to represent his interests under that agreement.[1] On October 17, 1983, this action was removed to federal court by defendant Union. Defendants now move for dismissal of the complaint on the ground that plaintiff's claims are time-barred under the six month statute of limitations applied by the Supreme Court in *DelCostello v. International Brotherhood of Teamsters*, 51 U.S.L.W. 4693 (U.S. June 8, 1983). It is undisputed that this action was filed more than six months after the alleged breach took place.[2] However, plaintiff argues that DelCostello is distinguishable and that the three year New York statute of limitations for malpractice actions is applicable to his claim against defendant Union for the breach of duty of fair representation.

The Court agrees with defendants that the *DelCostello* decision is controlling. *See also Yolande Assad v. Mount Sinai*

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1. The Complaint also alleges that the Union and the Company "colluded and conspired" to breach the collective bargaining agreement. However, these allegations do not state an independent basis for relief. *See Abrams v. Carrier Corporation*, 434 F.2d 1234 (2d Cir. 1970).

2. According to the Complaint the alleged breach occurred no later than on or about January 22, 1981.

Hospital, et al., January 3, 1984, Slip Opinion (2d Cir.) (applying the holding in (*DelCostello*). In *DelCostello,* the Supreme Court held that the six months statute of limitations provided for by Section 10(b) of the NLRA governs both claims in a suit by an employee against an employer and a union, alleging that the employer breached a provision of a collective bargaining agreement and that the union breached its duty of fair representation by mishandling the ensuing grievance and arbitration proceedings.

The only arguable distinction between the facts in *DelCostello* and those in the instant case, is that no arbitration proceeding took place in this case. However, this distinction is without legal significance. Justice Greenfield of the State Supreme Court enjoined defendants from submitting plaintiff's claim to arbitration on the ground that such arbitration would be futile. As stated by the Justice:

> It would be improper to insist that petitioner's claim be pressed in an arbitration between Printing Industries and the Union when both of these entities have already concluded that petitioner's claim has no merit.

Given Justice Greenfield's decision, we believe that for the purpose of determining the applicable statute of limitations, this case is indistinguishable from one where a union has allegedly breached its duty of fair representation by refusing to pursue a claim to arbitration, as in *Vaca v. Sipes,* 386 U.S. 171 (1976) or by pursuing it perfunctorily as alleged in *United Steelworkers of America, AFL CIO CLC v. Flowers,* 51 U.S.L.W. 4693 (U.S. June 8, 1983) (companion case to *DelCostello*). Therefore the six month limitations period of §10(b) of the NLRA governs each of the plaintiff's claims. Since this case was filed more than six months

after the alleged breach took place, it must be dismissed as time-barred.

It Is So Ordered.

Dated: New York, New York
January 11, 1983

Mary Johnson Lowe
United States District Judge